SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 20

BENNIE DANIELS AND LLOYD RAY DANIELS,
Petitioners,

vs.

ROBERT A. ALLEN, WARDEN, CENTRAL PRISON OF THE STATE OF NORTH CAROLINA, RALEIGH, NORTH CAROLINA

PETITION FOR REHEARING

O. JOHN ROGGE,
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Counsel for Petitioners.

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Of Counsel.

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To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners herein pray for a rehearing and reversal of the decision of this Court dated February 9, 1953 (— U. S. —), affirming the judgment of the Court of Appeals for the Fourth Circuit which affirmed the judgment of the District Court for the Eastern District of North Carolina denying the application of petitioners for writs of habeas corpus challenging their imprisonment by the State of North Carolina under judgments of death. This petition for rehearing is based upon substantial grounds available to the petitioners although not previously presented.

I

It will be recalled that in this cause petitioners, convicted and sentenced to death by the State of North Carolina, were denied any review of the substantial federal constitutional questions raised by that conviction, by appeal or otherwise, in North Carolina because their then counsel served the statement of the case on appeal as required by local practice one day late; and this Court has held that that delay also bars any review by federal habeas corpus.

In the majority opinion it was acknowledged that "this Court will review state habeas corpus proceedings even though no appeal was taken, if the state treated habeas corpus as permissible. Federal habeas corpus is available following our refusal to review such state habeas corpus proceedings." For these propositions the majority cited *Hawk* v. *Olson*, 326 U. S. 271, 278; *Herndon* v. *Lowry*, 301 U. S. 242, 247; and *Smith* v. *Baldi*, — U. S. —. Accordingly, it would appear that if any alternative remedy made available by the state is exhausted, then, notwithstanding a failure to appeal, the prerequisites established by 28 U. S. C. A. § 2254 are met. *Wade* v. *Mayo*, 334 U. S. 672.

Petitioners have previously suggested that they have exhausted remedies other than direct appeal made available by North Carolina and that therefore the alleged failure to appeal was immaterial. See Petitioners' Brief, p. 84. This aspect of petitioners' argument was neither noted nor commented upon by the majority opinion, although that opinion did discuss in detail the various proceedings in the courts of the State of North Carolina carried forward by the petitioners when confronted with the contention that they had failed properly to exhaust their appeal. See also Petitioners' Brief, pp. 6-9, 50-51. We respectfully submit that this suggestion by petitioners, which was only briefly made, almost as in passing, should now be further considered by the

Court, particularly in view of the circumstance that the majority opinion recognizes that the exhaustion of an alternative remedy is a sufficient basis for the satisfaction of § 2254.

We understand, of course, that the alternative remedies here exhausted may not afford the full measure of review which would be available if North Carolina had a habeas corpus proceeding similar in scope and nature to federal habeas corpus. But we submit that it would be ironical and paradoxical to deny federal habeas corpus on the ground that the alternative relief exhausted where there has been a failure to appeal affords a narrow rather than a broad area of review. Certainly the fact that the state makes possible only limited review after failure to appeal should be an inducement rather than a deterrent to review by federal habeas corpus.

Finally in this connection we observe that in several instances the majority opinion suggests that the North Carolina Supreme Court, in disposing of the appeal and the various efforts of petitioners to obtain review by that court, looked into and passed upon the merits of the appeal. These suggestions by the majority opinion would appear to mitigate the severity of denying *any* appellate review of the fundamental federal constitutional errors committed in the convictions of the petitioners resulting in judgments of death. But the stark injustice of the situation in which the petitioners find themselves cannot thus be averted. If there has been a review of the merits by the North Carolina Supreme Court in passing upon the appeal, then it cannot fairly be said that the petitioners have failed to exhaust their remedy of appeal for purposes of federal habeas corpus; and if there has not been such a review on the merits then the fact must be faced and it must be understood that petitioners are being required to go to their

deaths without having once had the benefit of an appellate inquiry into the constitutional propriety of the procedures whereby they were convicted.

II

The majority opinion discussed the one-day delay in the serving of the case on appeal by counsel for petitioners and considered that delay to be fatal to the institution of federal habeas corpus proceeding without commenting upon the sufficiency of the cause or reason which had been asserted for that delay. Apparently the question considered was whether the 60-day period allowed for the serving of the case on appeal was adequate and in accord with constitutional requirements and, concluding that it was so, the majority found that the failure to comply with the 60-day period was an absolute bar to any further relief irrespective of how gross the constitutional error committed in these capital cases.

In other analogous circumstances this Court did not thus evaluate the failure to comply with similar state requirements of time. *Patterson* v. *Alabama*, 294 U. S. 600; *Moore* v. *Dempsey*, 261 U. S. 86. But quite apart from whether, in general, the failure to comply with state time requirements may be deemed fatal in a capital case where as here the delay is not jurisdictional in nature, in this case the petitioners have and have asserted adequate cause for the delay.

The particular circumstances of this case require that the sufficiency of the cause for the delay be independently considered and passed for purposes of federal habeas corpus and not merely considered with a view to ascertaining whether the Supreme Court of North Carolina violated the Fourteenth Amendment in denying the appeal. For here the determination to deny the appeal by the North Carolina Supreme Court was based on state grounds and review by this Court by certiorari would be unavailable

(*White* v. *Ragen*, 324 U. S. 760, 765; *House* v. *Mayo*, 324 U. S. 42, 48); and no alternative state remedy may be available to petitioners to be exhausted as a predicate to federal habeas corpus jurisdiction. Accordingly, here the alleged failure to appeal operates to cause a *total* exclusion of federal review. State action reaching such a result should be independently reviewed and appraised by the appropriate federal tribunal, and not merely for purposes of constitutionality, but as well to determine, for purposes of *federal* jurisdiction, whether the action of the litigant is such as to warrant the complete deprivation of access to the federal courts. This is a federal question to be passed upon independently by federal courts. Upon rehearing we seek review of the facts set out previously (Petitioners' Brief, pp. 5-6, 34-36) on the basis of the foregoing criterion; on such review we think the only possible conclusion is that petitioners were entitled to the exercise of federal habeas corpus jurisdiction.

Conclusion

It is respectfully prayed that this petition for rehearing be granted and upon rehearing that the order of this Court affirming the judgment of the Court of Appeals for the Fourth Circuit denying the applications of petitioners for writs of habeas corpus be reversed and that such applications be granted.

Respectfully submitted,

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Petitioners,

O. JOHN ROGGE
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Certificate

Counsel for petitioners certifies that this petition for rehearing is presented in good faith and not for delay, and that the petition is restricted to the grounds above specified.

O. JOHN ROGGE

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